CLERK'S C

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 907

JESSE C. DUKE

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED APRIL 20, 1937

CERTIFICATE

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In United States Circuit Court of Appeals, Fourth Circuit

No. 4165

JESSE C. DUKE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia, at Alexandria

Question certified to the Supreme Court of the United States by the Circuit Court of Appeals of the Fourth Circuit on the case stated

Statement of facts

This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides:

"Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both."

The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months imprisonment or fine of $1,000, or both, may be prosecuted by information, in view
2 of Sec. 335 of the Criminal Code. 18 U. S. C. A. 541, which, as amended by the Act of Dec. 16, 1930, 46 Stat. 1029, provides:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: Provided, that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Notwithstanding the decision in Thorm v. United States (C. C. A. 3d) 59 Fed. (2d) 419, cert. denied 287 U. S. 524, this court is divided and in doubt as to whether a misdemeanor may be prosecuted by information where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of

such misdemeanors denounced by the Criminal Code (See Hearings before House Juidicary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court.

Being divided and in doubt, therefore, this court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following questions of law, the determination of which is indispensable to a proper decision of the case.

Questions

1. May a misdemeanor, for which no infamous punishment is prescribed, be prosecuted by information, where the punishment therefor may exceed $500 fine or six months' imprisonment, without hard labor, or both?

3 2. May an offense under Sec. 137 of the Criminal Code be prosecuted by information?

This April 17, 1937.

JOHN J. PARKER,
United States Circuit Judge.
ELLIOT NORTHCOTT,
United States Circuit Judge.
MORRIS A. SOPER,
United States Circuit Judge.

[Clerk's certificate to foregoing certificate omitted in printing.]

Enter Jesse C. Duke, in forma pauperis. File No. 41,447. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 907. Jesse C. Duke vs. The United States of America. Certificate. Filed April 20, 1937. Term No. 907 O. T. 1936.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 907

JESSE C. DUKE

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF JESSE C. DUKE.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 907

JESSE C. DUKE

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF JESSE C. DUKE.

Opinions Below.

No opinions have been rendered in the District Court or in the Circuit Court of Appeals.

Jurisdiction.

The certificate from the United States Circuit Court of Appeals was filed in this Court on April 20, 1937, and its jurisdiction is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The questions certified are as follows:

1. May a misdemeanor, for which no infamous punishment is prescribed, be prosecuted by information, where the punishment therefor may exceed $500 fine or six months' imprisonment, without hard labor, or both?

2. May an offense under Sec. 137 of the Criminal Code be prosecuted by information?

Statute Involved.

The statute involved is set out in the statement, *infra*.

Statement.

The statement is quoted verbatim from the certificate, as follows:

This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides:

> "Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisonment not more than six months, or both."

The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months' imprisonment or fine of $1,000, or both, may be prosecuted by informa-

tion, in view of Sec. 335 of the Criminal Code, 18 U. S. C. A. 541, which, as amended by the Act of Dec. 16, 1930, 46 Stat. 1029, provides:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: Provided, that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor, for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Notwithstanding the decision in *Thorm* v. *United States*, (C. C. A. 3d) 59 F. (2d) 419, cert. denied 287 U. S. 624, this Court is divided and in doubt as to whether a misdemeanor may be prosecuted by information where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court.

Summary of Argument.

The Government would have this Honorable Court hold that this bitterly-contested legislation *did not change the law* and *neither added to nor subtracted from the previous law.* The Government takes the illogical position that under the statute, as construed prior to this 1930 amendment, it had the power to use informations in prosecuting any misdemeanor, where the punishment did not exceed twelve months imprisonment and $1,000 fine, or both, and that when

Congress, by the 1930 amendment, specifically changed the limit of the cases which could be prosecuted by informations to those offenses which did not exceed six months imprisonment without hard labor and in a common jail or $500 fine, or both, Congress did not intend to change the former limit, or to change the statute which it amended. The Government takes the extraordinary position that when Congress amended this act and plainly specified the class of cases in which prosecution by information could thereafter be used that Congress did not intend to exclude its use in higher offenses, despite the canon of statutory construction, *expressio unius est exclusio alterius*. In an attempt to argue that the maxim does not apply because Congress showed a contrary intention that brings it within the exception to the maxim, the Government would have this Court accept the expressions in an excerpt from the report of a Commission in disregard of the established rule that the intent of Congress, in case of doubt, is to be gathered from the Congressional reports and the debates in Congress and in the Committee of Congress. The Government urges this view despite the historical fact that Congress defeated the key-stone bill, providing for summary hearings before United States Commissioners, of this Commission's program, and that this present amendment was a part of that proposed program for summary hearing of criminal cases and was obviously designed to set as high a limit for the use of informations, and the destruction of the citizen's protection under the grand jury provision of the Fifth Amendment of the Constitution, as the Commission thought that the Federal courts *might* uphold. The Government's argument disregards the fact that this Court, in *United States* v. *Moreland*, 258 U. S. 433, (1923) had declared unconstitutional the attempt to prosecute every misdemeanor by the use of an information, so that the Commission and Congress was forced to adopt a limit of less than twelve months and $1,000 fine,

or both, in view of the holding in that case, if it was the purpose of adopting a smaller and newer limit within which the use of informations *might* be upheld by the courts as constitutional. The smaller and newer limit for the use of informations was *one half* of that in the act before amendment, or six months and $500 fine, or both, and even this limit was subject to the imprisonment being *in a common jail* and *without hard labor*. Even if the Constitution permitted a higher limit than that fixed by the 1930 Amendment, the statutory limit would be controlling as a matter of *jurisdiction* of the Federal courts.

The appellant below respectfully submits that the 1930 Amendment to the act requires an answer of "No" to both questions certified by the Fourth Circuit Court of Appeals. Furthermore, the appellant below submits that the smaller and newer limit for the use of prosecutions adopted in 1930 exceeds the constitutional limit possible under the grand jury provisions of the Fifth Amendment, although it is not necessary for the Court to pass upon this point if it accepts the argument that the statute does plainly fix the present limit for the use of informations to those offenses where the punishment cannot exceed six months or $500 fine, or both. If the latter statutory limit is not held to be determinative of an answer to both questions in the NEGATIVE, it is considered obvious that a further constitutional question is involved for decision in a construction of whether a prosecution of the substantive offense, Sec. 137 of the Criminal Code, would not require grand jury indictment under the Fifth Amendment in view of the nature of the offense, which seems clearly an "infamous offense" in view of the fact that it would appear to be *mal per se* rather than *mal prohibita*.

ARGUMENT.

Since the 1930 Amendment to Section 335 of the Criminal Code, Congress Has Prohibited the Prosecution by Information of Criminal Offenses Where the Punishment Therefor May Exceed $500 Fine or Six Months' Imprisonment in a Common Jail Without Hard Labor, or Both.

This point raises a plain question of statutory construction of Section 335 of the Criminal Code, as amended in 1930.

Prior to 1909, certain Federal decisions had held that the term "infamous offenses" in the Fifth Amendment of the Constitution excluded misdemeanors and that the latter offenses could be prosecuted by information. As many misdemeanors provided for punishment of a long term of years and large fines, and it was also doubtful which offenses were felonies and which were misdemeanors, it became necessary to settle this question.

Congress solved this question in 1909 by passing Sec. 335 of the Criminal Code (18 U. S. C. A. Sec. 541), then reading as follows:

> All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. ALL OTHER OFFENSES SHALL BE DEEMED MISDEMEANORS.

Without any positive statutory authority for the use of informations in criminal prosecutions, the Federal courts held that misdemeanors, punishable according to this classification and with imprisonment not exceeding a limit of one year, were not infamous crimes under the Fifth Amendment and could be prosecuted by information, until the decision in *United States* v. *Moreland*, 258 U. S. 433 (1922).

The *Moreland* case declined to accept the arbitrary test as to whether the punishment prescribed for the offense did

not exceed the one year limit. It was a misdemeanor, for non-support of minor children, with a possible penalty of one year or fine of $500, or both. As the statute permitted the imprisonment to be at hard labor, the Court held the misdemeanor to nevertheless provide *infamous* punishment, and that grand jury action was necessary and that the misdemeanor could not be prosecuted by information. *The result of the opinion necessarily destroyed the arbitrary classification of whether the offense was a misdemeanor or a felony, or whether the limit of punishment was more than one year's imprisonment as the supposed dividing line in the use of informations* and held that other factors must be considered.

As fully treated in the legislative history hereafter, legislative proposals were made in Congress in 1928, and continued in 1930, to permit United States Commissioners to try or hear various criminal offenses and these proposals necessarily involved the question of the limitation on the use of informations, among other constitutional questions, and a thorough discussion of the *Moreland* case.

Congress then enacted the 1930 amendment to Section 335 of the Criminal Code, by adding to it the following:

> *Provided*, that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor, for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint.

Before properly resorting to the legislative history to resolve any possible doubt, it is necessary to examine the plain words of the statutes for its meaning.

The only decision on the construction of the statute as amended seems to be *Thorm* v. *United States*, 59 F. (2d) 419 (C. C. A. 3d, 1932), certiorari denied 287 U. S. 624, where the appellant raised the question at issue, and the

District Judge, speaking for the Third Circuit Court, merely said:

> I think this position to be wholly untenable. Congress was simply attempting to divide misdemeanors into two classes, one class of which it designated as petty offenses, with lower penalties. There are no words *in the act*, either expressly or by a reasonable implication, by which the remaining class of misdemeanors should be made subject to indictment.

The Fourth Circuit Court, in its certificate, says:

> Notwithstanding the decision in *Thorm* v. *United States* (C. C. A. 3d) 59 Fed. (2d) 419, cert. denied 287 U. S. 524, THIS COURT IS DIVIDED AND IN DOUBT as to whether a misdemeanor may be prosecuted by information where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court.

Col. Francis G. Caffey, now United States District Judge, Southern District of New York, stated the tabulation of misdemeanors, by length and character of punishment, *but without regard to whether mal per se or merely mal prohibita, or whether involving moral turpitude*, to be as follows:

> There are 77 offenses included in that list where the maximum punishment is one year. Of those, in some 11 of the cases the fine as an alternative punishment exceeded $1,000; so that I have dropped the figure "77" and have confined my figures which I am going to sum up to you, to where the maximum punishment is one year imprisonment or $1,000 fine, or both; and there are

66 of these offenses under the criminal law of the United States.

There are 28 offenses where the maximum punishment is six months or $1,000 fine, or both—that is, not exceeding $1,000. Sometimes it is less.

There are 21 of those offenses in which the maximum punishment does not exceed three months, or a fine of various amounts, none of which go above $1,000; and there are 94 of those offenses in which the maximum punishment does not exceed $1,000 fine.

That makes a total of 209 offenses.

Now, you may make some guess as to *how wide the scope would be if you limited the application of it to cases where there is no imprisonment.*

Mr. Moore: How many offenses have you there *where there is no imprisonment?*

Mr. Caffey: Out of 209 offenses in this list, there are 94.

Before discussing the legislative history, a few remarks may be made as to the *Thorm* case.

1. If all misdemeanors could be prosecuted by information, there could have been no purpose in enacting this bitterly-contested law specifically limiting the use of informations to misdemeanors with six months imprisonment, or $500 fine, or both. Such a view imports that Congress enacted an unnecessary, a senseless and a useless amendment to the act.

2. The *Thorm* decision was an assertion rather than a conclusion based on facts or principles stated.

3. The decision did not refer to or consider the *Moreland* case, involving a misdemeanor, which this Court held to require grand jury action.

4. The decision also ignored the maxim, *expressio unius est exclusio alterius.* Having expressly amended the act to state the class of offenses in which informations may be used, it would ordinarily exclude other offenses unless the

intent of Congress clearly indicated otherwise, and this intent must be gathered from the reports, and, possibly, the debates and hearings.

5. If there were doubt, the conclusive error of the *Thorm* case is demonstrated in the legislative history, reports, debates and hearings, on the amendment to the act.

Legislative History of the 1930 Amendment.

The legislation originated in the House of Representatives where extensive hearings were held on bills endorsed by the Association of the Bar of the City of New York and others in 1928 and 1930 before the House Judiciary Committee. The Senate held no hearings and its report is No. 1161, 71st Congress. In 1930, the National Commission on Law Observance and Enforcement proposed three bills. The House hearings are entitled, "To Change Procedure in the Federal Courts in Certain Cases", Serial 1, Parts 1, 2, and 3, 1928, and "To Enlarge the Powers of U. S. Commissioners and to Amend Title 2 of the National Prohibition Act," Serial 2, 1930. A copy of the hearings has been obtained for each Justice. The House Report is No. 1699, 71st Congress, including Part 2, containing the Minority Views of Congressmen Henry St. George Tucker and F. H. La Guardia, and this is printed as an Appendix hereto. The proceedings and debates in the House appear in the Congressional Record of June 3 and 4, 1930, and are important.

One of the 1928 bills was based on a limit of twelve months imprisonment or $1,000 fine, or both, within which grand jury indictment and jury trial could be denied, while the Bar Association bill was purposely left indefinite, as Judge Caffey explained, due to the constitutional question involved in fixing a limit and left this to judicial interpretation as to the limit. (Ser. 1, Pt. I, pp. 4, 27, 31). The Commission bill, as later amended and enacted in 1930, fixed the limit at six

months' imprisonment or $500 fine, or both. The companion Commission bill changed certain prohibition offenses from felonies with five years imprisonment or $10,000 fine, or both, to the limit set in the other bill, and both were enacted.

The third Commission bill, empowering United States Commissioners to hear all offenses within this limit under an involved procedure, passed the House but failed of passage in the Senate so that the keystone proposal of the series of three associated Commission bills was defeated. Three years later, the prohibition bill which had been enacted was discarded with the Eighteenth Amendment and the rest of the prohibition laws. Consequently, the act at issue is the only legislation proposed by the Commission remaining in effect, and it specified the class of cases which thereafter could be prosecuted by information. The majority report stated this purpose in plain language:

> Such petty offenses may be prosecuted upon information or complaint and THUS the cumbersome machinery of INDICTMENT BY A GRAND JURY IS RENDERED UNNECESSARY.

Mr. Tucker and Mr. LaGuardia, in the Minority Report, quoted from *Schick* v. *United States,* 195 U. S. 65, and said:

> How can any offense be deemed petty that may deprive a man of his liberty for six months by imprisonment in jail, even a common jail? No time in jail is needed to make the offense INFAMOUS, for the clank of the jail door as it closes upon him is enough to make a man of right feeling realize that such an offense means INFAMY. The NATURE OF THE OFFENSE and the PUNISHMENT provided must be properly CORRELATED; there is a natural interdependence between the two that can not be disregarded. To the ordinary man there is nothing small (petty) about a fine of $500. • • • No "PETTY OFFENSE" SHOULD BE PUNISHED BY IMPRISONMENT.

It will be interesting to notice that the proponents had suggested a dividing line for use of informations about ONE

HALF of the misdemeanor in the *Moreland* case, which they thought the courts *might* accept as constitutional. Mr. Tucker moved an amendment on the floor of the House, to make the limit $100 fine only, without imprisonment, which was double the penalty upheld in the *Schick* case. This was ruled out of order because the "gag" rule prevented any Congressmen from offering an amendment. Mr. Tucker then moved to recommit with instructions to make this amendment, the vote being: ayes, 53, noes, 180, with nearly half of the membership not voting.

The Chairman of the House Judiciary Committee, Hon. George S. Graham, stated to the House that its purpose was to draw "the dividing line" as to "offenses that could be proceeded against by information" and avoid grand jury action, saying:

> The purpose of the bill is to pave the way for what might be termed the *Stobbs* bill, which FURTHER DEFINES WHAT CONSTITUTES PETTY OFFENSES.
>
> This amendment, as you will notice, is not an amendment confined to liquor cases or anything of that kind, but it is an amendment to the Code drawing THE DIVIDING LINE between felonies and misdemeanors as to the matter of punishment, by a fine not exceeding $500 or imprisonment not exceeding six months. THAT WAS IN ORDER THAT WE MIGHT HAVE A CLASS OF OFFENSES THAT COULD BE PROCEEDED AGAINST BY INFORMATION. IT DOES AWAY WITH THE CUMBERSOME MACHINERY OF GRAND JURY INTERVENTIONS AND THE FINDING OF BILLS.

The *Moreland* case had refused to uphold the former dividing line and this was repeatedly pointed out in the hearings.

Hon. John J. O'Connor, the present majority leader, said:

> You would not have the right to use an information or complaint without this bill.

Hon. R. Walton Moore, now Assistant Secretary of State, like Mr. O'Connor, opposed the limit fixed, saying:

> The purpose of the bill is to dispense with presentments by grand juries in a certain class of cases. • • • But there are such offenses that were crimes at common law when the Constitution was adopted and are deemed infamous and must be prosecuted by indictment, and the gentlemen's bill therefore would be covering cases which permissibly may be prosecuted on information, but including cases which are compellably prosecuted on indictment. • • • Here you include cases of offenses that are infamous and must be laid before grand juries. • • • There are some misdemeanors where the punishment may not be more than six months in jail or more than $500, and they are nevertheless infamous. • • • YOU MAY HAVE AN INFAMOUS OFFENSE PUNISHABLE BY A FINE SIMPLY OR BY CONFINEMENT IN JAIL FOR A MONTH.

Mr. Stobbs (R., Mass.) interjected into Mr. Moore's remarks the statement that "this bill expressly eliminates all" three elements held to constitute an infamous offense.

Hon. Henry St. George Tucker, in his speech similar to the minority report views (see appendix), pointed out:

> Can you make an offense petty by calling it so. • • • When you put a man in jail that is not petty. • • • A petty offense must not only be TRIVIAL but the PENALTY for it must be.

Mr. Linthicum (D., Md.) accused the proponents of fixing the highest possible limit which they thought could evade grand jury and jury trial:

> I quite agree with the gentleman from Virginia in his theory of petty offenses, but that is not the intention of this bill. This bill is to raise the limit of petty offenses as high as it is possible to do it, so that these cases may be tried by the commissioner without a jury. The bill is against the principles established by our Govern-

ment and for which the Anglo-Saxon people fought for centuries, and it is against the traditions of our country. We should not imperil our institutions on account of prohibition.

All five Congressmen, taking part in the debate in the House, thus agreed that the bill was fixing the highest limit which any Congressman believed *might* he held constitutional for the use of informations thereafter in prosecutions. The word "may" was used to enable grand juries to indict even in these smaller offenses, as the present chairman of the House Judiciary Committee asked a specific statement to cover:

> Mr. Sumners: • • • I want in the *Record* what amounts to a legislative construction of the bill. That it is the understanding of the author of the bill, now in charge of it, and of the gentlemen of the committee, that this bill as now presented does not prevent the grand jury from the privilege and right to return indictments in the class of cases and offenses designated in this bill as petty.
>
> Mr. Christopherson: Absolutely not.

There is the legislative record from which the Court, under its decisions, ascertains the Congressional intent if there is any doubt about the plain language of the act as amended in 1930.

The report of the Crime Commission is good evidence of its intent but not of the Congressional intent.

Congress had a right to fix the limit for the use of informations and it did so. To the limit that it fixed, it is binding in prosecutions as a jurisdictional matter. However, even this limit is unconstitutional, and exceeds the constitutional limit, on which point the Minority Views of Mr. Tucker and Mr. LaGuardia and the *Schick* case is cited, which will be found in the appendix. The dissent of Justices McReynolds and Butler in the recent case of this term of

court, *District of Columbia* v. *Clawans*, — U. S. —, is cited as correctly setting forth the previous rulings of this Court and the unbroken practice of the Federal courts throughout the history of the Republic. However, the decision does not go to the limit fixed in this 1930 amendment and expresses doubt that the limit can be set as high as in the statute. It is not believed necessary to pass upon this question in view of the statute. If so, then a further question is raised that the offense, Sec. 137 of the Criminal Code, the legality of the prosecution of which by information is raised below is of the probable character of offenses *mal per se* rather than *mal prohibita* and not only would a final conviction be possibly held to be one involving moral turpitude but would also possibly affect credibility, provided it is interpreted by the court below as requiring the requisite criminal intent and that the intent to influence means, as conceded by the Government below, "improperly" influence as distinguished from the right of any citizen to petition the grand jury to consider a prosecution, or investigation of matters which would show no basis for a threatened criminal indictment, which question is not certified to this Court.

It is not believed necessary to decide the questions except as a matter of statutory construction unless these questions uphold the contention of the Government, in which case the constitutional questions are necessarily before the Court and are expressly set up and presented in that contingency.

Conclusion.

The conclusion of the appellant below is that both questions certified by the United States Circuit Court of Appeals for the Fourth Circuit should be answered: "NO."

JESSE C. DUKE,
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1301 Mass. Ave., N. W.,
Washington, D. C.

APPENDIX.

HOUSE OF REPRESENTATIVES.

71st Congress, 2d Session.

Report No. 1699.

Defining Petty Offenses and Providing Penalties Therefor.

May 28, 1930.—Referred to the House Calendar and Ordered to be Printed.

Mr. Graham, from the Committee on the Judiciary, submitted the following

Report.

[To accompany H. R. 10341.]

The Committee on the Judiciary, to whom was referred the bill H. R. 10341, after consideration reports the same favorably with amendments and recommends that the bill as amended do pass.

The committee amendments are as follows:

Page 1, line 3, strike out the words and figures "541 of the United States Code, being section".

Page 1, line 4, strike out the parenthesis and the figures "March 4, 1909".

Page 1, line 5, after the figures "1152" strike out the parenthesis and before the word "be" insert the following in parenthesis: "Sec. 541, title 18, U. S. C."

Page 1, line 10, strike out the words "not involving moral turpitude".

Page 2, lines 5 and 6, strike out the words "before the United States commissioner, as may now or hereafter be provided by law,".

Amend the title so as to read:

A bill to amend section 335 of the Criminal Code.

This bill is one of a series of bills recommended by the National Commission on Law Observance and Enforce-

ment appointed by the President and the bill as amended has the approval of that commission as well as of the Attorney General. The communication from the Attorney General inclosing the recommendation of the National Commission on Law Observance and Enforcement is printed herewith and made a part of this report, as follows:

Office of the Attorney General,
Washington, D. C., May 24, 1930.

Hon. GEORGE S. GRAHAM,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN:

Having received requests from members of your committee for further expressions of opinion upon several bills pending before your committee intended to relieve congestion in the courts, particularly H. R. 10341, H. R. 9985, and H. R. 9937, I asked the National Commission on Law Observance and Enforcement to consider the subject. I am just in receipt of a letter from the chairman of the commission presenting the commission's suggestions on these measures, copies of which are inclosed for the information of your committee.

The commission has given very careful consideration to these measures, and speaking for this department, I accept their conclusions on the various points that have been under consideration, and hope that they will receive favorable consideration from your committee.

Respectfully,

WILLIAM D. MITCHELL,
Attorney General.

National Commission on Law Observance and Enforcement.

Washington, D. C., May 23, 1930.

Hon. WILLIAM D. MITCHELL,
Attorney General, Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL:

The commission to-day considered in extenso the various bills pending before the Committee on the Judiciary of the House of Representatives growing out of the recommendations contained in its report to the President, dated November 21, 1929, and the supplemental report, and additional bills growing out of the subject matter dealt with in these reports. As a result of the discussion, I was directed to advise you that the commission feels that among the bills so far suggested, its recommendations would be most effectively carried out by the passage of the following bills, modified as suggested in the attached memorandum: H. R. 10341, H. R. 9985, and H. R. 9937.

I am, very truly yours,

GEO. W. WICKERSHAM,
Chairman.

Memorandum of Bills Pending in House of Representatives Approved as Appropriate to Carry Out Recommendations of National Commission on Law Observance and Enforcement

I.

H. R. 10341, changed as follows:

Page 1, line 10, leave out the words "not" to "turpitude," inclusive.

Page 2, line 5, leave out the whole line.

Page 2, line 6, leave out the words from the beginning of the line to "law," inclusive.

The substantive part of the bill would then read as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: *Provided,* That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

II.

H. R. 9985, changed as follows:

Page 2, line 5, strike out the word "single."

Page 2, line 7, after "of" insert "not more than one gallon of."

Page 2, line 8, omit after the word "of"—that is, omit the words "small quantities of."

Page 2, line 9, after "section" insert "in an amount not exceeding one gallon."

Page 2, line 13, omit the words "small quantities of" and insert after the word "of" "not exceeding one gallon of."

Strike out lines 14 and 15 and insert instead "not habitually engaged or employed in violation of the law."

The proviso in the Jones law would then read as follows:

"*Provided,* That any person who violates the provisions of the national prohibition act, as amended and supplemented, in any of the following ways: (1) By a sale, by a person not engaged in habitual violation of the law, of not more than one gallon of liquor as that word is defined by section 1 of title 2 of said act; (2) by unlawful making of liquor, as that word is defined by said section, in any amount not exceeding one gallon, where no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined as a casual employee only; (4) by unlawful transporting of not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in violation of the law, shall for each offense be subject to a fine of not to

exceed $500 or to be confined in jail without hard labor, not to exceed six months, or both."

III.

H. R. 9937, changed as follows:

Title, strike out after the word "of" and insert "petty offenses."

Page 1, line 3, strike out the word "casual."

Also strike out all of line 4 and the word "act," in line 5, and substitute the words "petty offenses."

Page 2, line 22, change "3" to "5."

Page 3, line 2, change "3" to "5."

Page 3, add:

"SEC. 6. This act shall not apply to the Territory of Alaska."

This bill merely defines petty offenses to include those the penalty for which does not exceed confinement in a common jail without hard labor for a period of six months or a fine of not more than $500, or both. Such petty offenses may be prosecuted upon information or complaint and thus the cumbersome machinery of indictment by a grand jury is rendered unnecessary.

There is printed herewith under the rule copy of the law showing the new language proposed by the bill in italics:

All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: *Provided, That all offenses, the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint.*

HOUSE OF REPRESENTATIVES.

71st Congress, 2d Session.

Rept. 1699, Part 2.

To Amend Section 541 of the United States Code.

June 2, 1930.—Referred to the House Calendar and Ordered to be Printed.

Mr. Tucker, from the Committee on the Judiciary, submitted the following

Minority Views.

[To accompany H. R. 10341.]

[Omit matter within brackets and insert the part printed in italic.]

A Bill To amend section 541 of the United States Code, being Section 335 of the Criminal Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section [541 of the United States Code, being section] 335 of the Criminal Code [(March 4, 1909], chapter 321, paragraph 335; Thirty-fifth Statutes, page 1152[)], (*sec. 541, title 18, U. S. C.*) be amended to read as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: *Provided*, That all offenses [not involving moral turpitude,] the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted [before the United States commissioner, as may now or hereafter be provided by law,] upon information or complaint."

Amend the title so as to read: "A bill to amend section 355 of the Criminal Code."

The object of this bill is most commendable, to relieve the burden upon the district courts of the United States in the trial of petty offenses under the prohibition law upon information or complaint. To relieve the court of these burdens and the intricacies involved, of indictments, grand juries, etc., is much to be desired, and I heartily agree with the object of the bill.

The defect in the bill, to my mind, is its definition of a petty offense. Surely to the ordinary man or woman in the country a fine of $500 and imprisonment in jail for 6 months can not be regarded as "petty" and this may be the punishment under this bill for one who sells a drink or transports it to a friend.

What constitutes a petty offense? Is it determined entirely by the nature of the offense? Is it dependent alone upon the act of Congress in declaring that such and such a thing is a petty offense? How is its pettiness determined? How ought it be determined? We think the petty offense must be determined by two conditions, (1) the nature and character of the offense, and (2) by the punishment which the conviction of such offense carries. If the violation of a town ordinance that prohibits a man from crossing a street at a certain point carries with it a capital punishment can that be regarded as a petty offense? Can the name change the character of the offense any more than the devoted young wife awaiting day by day the coming of her first child, anxious to give him the name of his father, can change the girl baby that arrives to a boy baby by calling him John, instead of Sallie? No, it is not the name; it is the character, the nature of the offense that determines, partly at least, whether it be petty or infamous, but if it is found, under this rule, that a trifling, petty offense in description carries with it later punishment in the penitentiary or jail, or any deprivation of liberty, the offense is changed at once from a petty offense to a criminal offense with the emphasis upon its criminality. In other words, the nature and character of the offense, and the punishment must together determine the grade of the offense.

Judge Brewer, in Schick *v.* United States, supra (195 U. S. 68) well states the doctrine:

The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors.

In this bill the petty offenses are described as those that may be punished by a fine of $500 or confinement in jail for six months, or both. How can such punishment in the bill accord with the declaration that these offenses are petty? The boy at the dance, or the girl at the dance, that is caught with a thimble of whisky on them may go to jail for six months and be required to pay a fine of $500. The farmer who may take a tablespoonful of whisky or brandy to a dying neighbor may be put in jail for six months, serving from April to October, and pay a fine of $500; will he rejoice with untold joy, as he rests in jail from seed time to harvest, when told by his counsel not to fret for he was convicted only of a petty offense? To make the punishment under this bill suitable to the offenses charged there should be no imprisonment in the punishment, and this is more clearly seen from the fact that these petty offenses, which are recognized by our Government, at common law, were tried without a jury, because not regarded as crimes; but where the punishment results in imprisonment in the penitentiary or jail, under our American system it can not be claimed the offense is petty. Judge Harlan in Schick *v.* United States (195 U. S. 95), states the doctrine finely:

And, perhaps, all will agree that the constitutional injunction [the trial of all crimes, except cases of impeachment, shall be by jury Art. III sec. 2] applies with like force to such misdemeanors as by statute are punishable with imprisonment, and that a circuit or district court of the United States is without jurisdiction, under a plea of not guilty, no jury being empaneled, to try any crime against the United States involving life or liberty. The consent of the accused in such a case certainly can not confer upon the court authority to try the crime in a mode inconsistent with the one prescribed by the law.

How can any offense be deemed petty that may deprive a man of his liberty for six months by imprisonment in jail, even a common jail? No time in jail is needed to make the offense infamous, for the clank of the jail door as it closes upon him is enough to make a man of right feeling realize that such an offense means infamy. The nature of the offense and the punishment provided must be properly correlated; there is a natural interdependence between the two that can not be disregarded. To the ordinary man there is nothing small (petty) about a fine of $500, nor can he be deprived of his liberty for 6 months and be consoled by the assurance that if his offense had not been "petty" he might have had 12 months in the penitentiary. No "petty offense" should be punished by imprisonment.

HENRY ST. GEORGE TUCKER.

I concur in above conclusions.
F. H. LAGUARDIA.

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No. 907

In the Supreme Court of the United States

OCTOBER TERM, 1936

JESSE C. DUKE, APPELLANT

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

So far as appears from the certificate, no opinion was rendered either by the District Court or by the Circuit Court of Appeals.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on April 20, 1937. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions certified are the following:

1. May a misdemeanor for which no infamous punishment is prescribed be prosecuted by information where the punishment therefor may exceed $500 fine or six months' imprisonment without hard labor, or both?

2. May an offense under Section 137 of the Criminal Code be prosecuted by information?

STATUTE INVOLVED

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, so far as pertinent provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *.

The pertinent statutory provisions appear in the Statement at pages 2, 3, *infra*.

STATEMENT

The following statement of facts is contained in the certificate:

> This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides—
>
> "Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writ-

ing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both."

The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months imprisonment or fine of $1,000, or both, may be prosecuted by information, in view of Sec. 335 of the Criminal Code. 18 U. S. C. A. 541, which, as amended by the Act of Dec. 16, 1930, 46 Stat. 1029, provides—

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: Provided, that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Notwithstanding the decision in *Thorm* v. *United States* (C. C. A. 3d), 59 Fed. (2d) 419, cert. denied 287 U. S. 524, this Court is divided and in doubt as to whether a misdemeanor may be prosecuted by informa-

tion where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court.

SUMMARY OF ARGUMENT

Section 335 of the Criminal Code prior to its amendment in 1930 classified offenses as felonies and misdemeanors, and under this statute it was uniformly held that misdemeanors punishable by fine or by imprisonment not exceeding one year without hard labor, or both, were not infamous crimes within the meaning of the Fifth Amendment, and might be prosecuted by information. *Falconi* v. *United States,* 280 Fed. 766 (C. C. A. 6th), and cases cited; *Hunter* v. *United States,* 272 Fed. 235, 238 (C. C. A. 4th); *Christian* v. *United States,* 8 F. (2d) 732, 733 (C. C. A. 5th).

On December 16, 1930, Congress amended Section 335 of the Criminal Code by adding to the original provisions the following proviso:

> *Provided,* That all offenses, the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500,

> or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint.

The position of the appellant is that this amendment constituted a limitation upon the power to prosecute for misdemeanors by information. This precise question was ruled against the appellant in *Thorm* v. *United States,* 59 F. (2d) 419 (C. C. A. 3d), in which this Court denied certiorari, 287 U. S. 624. As that decision pointed out, the only legal effect of the amendment was to divide misdemeanors into two classes, one of which was to be designated as "petty offenses", and there is nothing in the amendment which either expressly or by reasonable implication can be considered as requiring the prosecution by indictment of any misdemeanor which it had been uniformly recognized theretofore might be prosecuted by information. The purpose of the amendment is clearly disclosed by its genesis. A study of the legislation pending when this amendment was introduced shows that it was then proposed to give United States Commissioners authority to try petty offenses, particularly in view of the congestion in the Federal courts which had resulted from prosecutions arising under the National Prohibition Act. Had that bill become law, the amendment would have been effective to permit the prosecution of petty offenses before such magistrates upon complaint or information. As it is, the present legal effect of the amendment is to define petty offenses and to permit their

prosecution, not only by information, but also by complaint without leave of court. Only by a forced and unnatural construction can there be read into this amendment a provision that misdemeanors theretofore triable on information must thereafter be prosecuted by indictment.

ARGUMENT

THE AMENDMENT IN 1930 OF SECTION 335 OF THE CRIMINAL CODE DID NOT ABROGATE THE WELL-ESTABLISHED RULE THAT MISDEMEANORS PUNISHABLE BY FINE, OR IMPRISONMENT FOR NOT MORE THAN A YEAR WITHOUT HARD LABOR, OR BOTH, MIGHT BE PROSECUTED BY INFORMATION

The two questions propounded by the court below are in substance the same and an answer to one of necessity will answer the other.

It is evident that the offense for which the appellant was prosecuted and of which he was convicted is a misdemeanor. Section 335 of the Criminal Code provides that "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors * * *." The maximum punishment which may be imposed under Section 137 of the Criminal Code, the statute under which the appellant was convicted, is a fine of $1,000 or imprisonment for not more than six months, or both.

Prior to the amendment of Section 335 by the addition thereto of the proviso (*infra,* p. 9), it was uniformly held that misdemeanors punishable by fine, or by imprisonment not exceeding one year,

without hard labor, or both, were not "infamous" crimes within the meaning of the Fifth Amendment (*supra;* p. 2) and therefore might be prosecuted by information. Thus, in *Falconi* v. *United States,* 280 Fed. 766 (C. C. A 6th), where the authorities are collated, it was said (p. 767):

> It is now thoroughly well settled that all felonies as defined by section 335 of the Criminal Code (Comp. St. § 10509) are infamous crimes, for which no person shall be held to answer unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. *Ex parte Wilson,* 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Mackin et al.* v. *U. S.,* 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson* v. *U. S.,* 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; *U. S* v. *De Walt,* 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; *In re Mills,* 135 U. S. 263, 267, 10 Sup. Ct. 762, 34 L. Ed. 107; *In re Claasen,* 140 U. S. 200, 204, 11 Sup. Ct. 735, 35 L. Ed. 409.
>
> It would seem to be equally well settled that misdemeanors punishable by fine, or by fine and imprisonment not exceeding one year, unless there should be coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous, are not infamous crimes, within the purview of the Fifth Amendment, and may be prosecuted by information. *In re Bonner, Petitioner,* 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. Ed. 149; 4 Blackstone,

Com. 310; *Hunter* v. *U. S.* (C. C. A.) 272 Fed. 235; *Robertson* v. *U. S.* (C. C. A.) 262 Fed. 948, 950; *Brown* v. *U. S.*, 260 Fed. 752, 171 C. C. A. 490; *Blanc* v. *U. S.*, 258 Fed. 921, 923, 169 C. C. A. 641; *U. S.* v. *Wells Co.* (D. C.) 186 Fed. 248; *U. S.* v. *Camden Iron Works* (D. C.), 150 Fed. 214; *De Four* v. *U. S.*, 260 Fed. 596, 598, 171 C. C. A. 360; *Weeks* v. *U. S.*, 216 Fed. 292, 298, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

In the case of *Wong Wing* v. *U. S.*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, the Supreme Court held that a statute authorizing imprisonment at hard labor for a definite period inflicts an infamous punishment, and therefore the offense, though a misdemeanor, is an infamous crime, within the meaning of the Fifth Amendment. This holding in the Wong Wing Case has been considered, approved, and followed by the Supreme Court in the recent case of *United States* v. *Moreland* (decided April 17, 1922) 257 U. S. —[1], 42 Sup. Ct. 368, 66 L. Ed. —. If the decision in *Wong Wing* v. *U. S.* was at all doubtful, that doubt has been dispelled by the clear, positive, and definite declaration of the Supreme Court in *U. S.* v. *Moreland* that imprisonment at hard labor for any definite term, regardless of the length of the term or the place of imprisonment is infamous punishment, and that, where the accused is in danger of an infamous punishment, if convicted, he has a

[1] 258 U. S. 433.

> right to insist that he be not put upon trial, except on the presentment or indictment of a grand jury.

See also *Hunter* v. *United States*, 272 Fed. 235, 238 (C. C. A. 4th); *Christian* v. *United States*, 8 F. (2d) 732, 733 (C. C. A. 5th).

As the statute under which the appellant was convicted does not provide for imprisonment at hard labor and the certificate recognizes that no infamous punishment is involved, it is apparent that it is not open to question that prior to the amendment of 1930 to Section 335 the appellant could have been prosecuted by information.

On December 16, 1930, Congress amended Section 335 of the Criminal Code by adding to its original provisions the proviso "That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

It is the position of the appellant, in effect, that this amendment constitutes a limitation upon the power to prosecute for misdemeanors by information which had been theretofore uniformly recognized and that thereafter the only class of misdemeanors in which prosecution may be by information are those wherein the punishment may not be more than six months' confinement in a common

jail without hard labor or a fine not in excess of $500, or both.

This precise contention was made before the Circuit Court of Appeals for the Third Circuit in the case of *Thorm* v. *United States*, 59 F. (2d) 419. That court held the contention was without merit, saying (pp. 419–420):

> It is the position of the defendants that this act of Congress changes all that has gone before, and definitely determines just what cases may be prosecuted on informations. Such cases, they say, are all those wherein the punishment could be no more than six months' confinement in a common jail, without hard labor, and a fine not in excess of $500; and that all other cases must be prosecuted by indictment. I think this position to be wholly untenable. Congress was simply attempting to divide misdemeanors into two classes, one class of which it designated as petty offenses, with lower penalties. There are no words in the act, either expressly or by any reasonable implication, by which the remaining class of misdemeanors should be made subject to indictment.

This Court denied a petition for writ of certiorari, 287 U. S. 624.

The correctness of this decision is made apparent by a statement of the genesis of the amendment, which was not discussed in the court's opinion in the *Thorm* case.

During the Prohibition era while the court had uniformly applied the general rule that misdemeanors punishable only by a fine or imprisonment for not more than one year, or both, might be prosecuted by information (Cf. *Brede* v. *Powers,* 263 U. S. 4; *Remus* v. *United States,* 291 Fed. 513 (C. C. A. 6th), certiorari denied, 263 U. S. 717; *Rossini* v. *United States,* 6 F. (2d) 350 (C. C. A. 8th)), there were many offenses arising under the National Prohibition Act and amendatory and supplemental legislation which as to first offenders were misdemeanors but became felonies where the offender was a habitual violator or guilty of second or subsequent offenses (National Prohibition Act, Sec. 29, p. 22, c. 85, 41 Stat. 316; *United States* v. *Kelly,* 51 F. (2d) 263, 267–268 D. C. S. D. N. Y.). In view of this situation prosecutors considered it safer to resort generally to indictments for all offenses under the National Prohibition Act, however minor, rather than to use information.

On January 13, 1930, the President sent to Congress a message, to which he appended a report of the Commission on Law Observance and Enforcement, in which he called attention particularly to the recommended plan of the Commission for reducing congestion in the Federal courts by giving United States Commissioners enlarged powers in criminal cases. This report was entitled "Preliminary Report on Observance and Enforcement of Prohibition", and in so far as it relates to relief of congestion in the Federal courts it is copied in

the Appendix hereto (*infra*, p. 15). In this report the Commission recommended to Congress that congestion in the Federal courts, particularly in cases to which the Jones Law applied, might be relieved by the creation of a class of offenses to be designated "petty offenses", which could be tried before United States Commissoiners upon information or complaint. The chief purpose of the recommendation was a decrease, not an increase, in the number of crimes to be presented by indictment. That the Commission did not intend to recommend any enlargement of the category of cases in which indictments were required is apparent from its statement that "as things are, however, the congestion of prosecutions in the Federal courts for minor infractions caused by the necessity of proceeding by indictment in all cases, *except for the maintenance of a nuisance or for unlawful possession,* is a serious handicap to dealing vigorously with major infractions and makes handling of minor infractions perfunctory." (Italics ours.)

Pursuant to the Commission's recommendations, three bills were introduced in Congress—one amending the Jones Law by defining "casual or slight violations," one defining "petty offenses" (the bill in question), and one giving United States Commissioners jurisdiction to try such offenses. (House Report No. 1699, 71st Cong., 2d Sess., Cong. Doc. 9193; Senate Report No. 1161, 71st Cong., 2d Sess., Cong. Doc. 9186.) The first two bills were

passed by Congress, but the Commissioners bill, so called, failed to become a law. Even so, the amendment of the Jones Law (Act of January 15, 1931, c. 29, 46 Stat. 1036, amending the Jones Law) created four classes of petty offenses. Thus the statute here involved, Section 335 of the Criminal Code as amended, in conjunction with the 1931 Amendment of the Jones Law clarified the situation confronting prosecutors with respect to petty liquor violations. Those offenses classified in both Acts as "petty offenses" might be prosecuted by information or complaint.

Thus, though the bill for the simplification of procedure in the trial and disposition of petty offenses failed of enactment, the amendment of Section 335 of the Criminal Code became law. This amendment was doubtless introduced in order to give statutory sanction to the treatment of all crimes the penalty for which does not exceed imprisonment for six months or a fine of not more than $500 or both, as "petty offenses" triable before a magistrate. See *Callan* v. *Wilson*, 127 U. S. 540, and *Schick* v. *United States*, 195 U. S. 65. When the Commissioners Bill failed, this purpose no longer existed, but Congress having nevertheless enacted the amendment to Section 335, legal effect must be given to its plain language without extending this language by implication to accomplish results which were plainly contrary to the legislative intent. The amendment deals only with misdemeanors punishable by imprisonment for not

more than six months and authorizes the prosecution of these to be instituted either by complaint or by information. It does not in terms apply to other misdemeanors which had always been prosecuted upon information with leave of court. *Albrecht* v. *United States*, 273 U. S. 1. The legal effect of the amendment, therefore, is to define petty offenses and to permit such offenses to be prosecuted not only upon information but also upon complaint without leave of court. This seems to us the obvious effect of the statute, and there is no necessity for the extension of its terms by implication in order to give it legal effect. To indulge such implications would defeat the obvious purpose of the law by requiring prosecution by indictment of all misdemeanors punishable by imprisonment for more than six months—a result directly opposed to the purpose sought to be accomplished.

It was in the light of this legislative history of the amendment to Section 335 of the Criminal Code that the *Thorm* case was decided. That decision is in conformity with the evident purpose of the amendment, which was obviously not intended to increase the classes of offenses which must be prosecuted by indictment.

CONCLUSION

For the reasons heretofore stated, we respectfully submit that the questions certified by the court below should be answered in the affirmative.

STANLEY REED,
Solicitor General.

BRIEN MCMAHON,
Assistant Attorney General.

WILLIAM W. BARRON,
Attorney.

J. T. M. REDDAN,
Special Attorney.

MAY 1937.

APPENDIX

Extract From Preliminary Report of Commission on Law Observance and Enforcement With Reference to Observance and Enforcement of Prohibition

(D) PROVISIONS FOR RELIEVING CONGESTION IN THE FEDERAL COURTS

From various parts of the country come complaints of congestion of the Federal courts due to the large volumes of petty prosecutions under the national prohibition act. Obviously, these prosecutions must go on. It would not do to create an impression that minor infractions are to be ignored. As things are, however, the congestion of prosecutions in the Federal courts for minor infractions caused by the necessity of proceeding by indictment in all cases, except for maintenance of a nuisance or for unlawful possession, is a serious handicap to dealing vigorously with major infractions and makes handling of the minor infractions perfunctory. It has done much to create a feeling in some localities that the law can not be enforced. In our opinion the delays and opportunities for escape from punishment thus occasioned may be and should be obviated.

Three methods to this end have been suggested: First, to increase the number of Federal judges; second, to create inferior Federal courts, or, as it has been put, Federal police courts, for such cases;

and, third, to utilize the present machinery of the courts, meeting the causes of delay and congestion by a simpler procedure for petty cases.

There are constitutional questions to be considered in connection with both the second and the third of these proposals. The first does not involve any constitutional difficulties. But it leaves the cumbersome procedure by indictment, wholly inappropriate to minor infractions, in full force and multiplies the apparatus designed for great cases in order to deal with small ones. The objections to this method are palpable, and it should not be adopted if the situation may be met in some other way. So with the second. It involves some of the constitutional questions which must give us pause in connection with the third. But, what is more to be thought of, there are serious objections to multiplying courts. If it is possible to deal with this matter adequately with the existing machinery of the Federal system, it should be done. We think such a solution entirely possible, and in the right line of progress, not merely in the enforcement of the national prohibition act but of all Federal legislation.

Under the fifth amendment no one shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury. As construed by the Supreme Court, "infamous crime" means one punishable by imprisonment in a penitentiary, or for more than one year, or for any period if at hard labor. Hence, where imprisonment is to be in jail, is not to exceed six months, and is not to be at hard labor, the crime is not infamous. It is only where there is a possibility of imprisonment in the penitentiary, or for more than

a year, or at hard labor, that an indictment is required. The Jones Law has expressly recognized a class of "casual or slight violations." A statute providing that in prosecutions under Title II of the national prohibition law the district attorney may, in case of "casual or slight violations", prosecute by complaint or information, and in such cases, when so prosecuted, the penalty for each offense should be a fine not to exceed $500, or imprisonment in jail without hard labor, not to exceed six months, or both, would obviate the long delay, unnecessary expense, and needless keeping in session of grand juries which are demanded by the present state of the law.

We think also that it would be expedient for Congress to define the term "casual or slight violations." Speedy convictions and certain imposition of penalties are important considerations, and are more likely to be efficacious than threats of severe punishment rendered nugatory by congested dockets overpassing any possibilities of trial in the manner constitutionally appointed for crimes of such magnitude. But this suggestion, made on general considerations applicable to all criminal laws, and out of abundant caution, may not be a vital part of the plan.

Next, to simplify the mode of prosecution of petty cases, we must consider the matter of pleas of guilty and of trials. As the law is, every offender must be indicted, must await indictment before he can plead guilty, even if ready to do so at once, and his case must, if he pleads not guilty, await its turn on the calendar, obstructing, if it is a petty case, the disposition of important cases. The mere accumulated number of these petty pros-

ecutions awaiting trial has become a source of embarrassment in many Federal courts.

Section 3 of Article III of the Constitution requires trial of all "crimes" to be by jury. The sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." It has been held that "crimes" in this connection does not refer to petty offenses. In view of the general holding of State courts on analogous provisions and of the concessions and distinctions made by the Supreme Court of the United States in the leading case of *Callen* v. *Wilson* (127 U. S. 540, 555, 557), we think it is possible to provide for a hearing in the United States district court before a magistrate, provided trial by jury in that court is preserved to the accused. But we see no need of setting up special Federal magistrates. It would seem entirely feasible to make use of the existing system of United States commissioners.

It could be provided that in case the accused, prosecuted by complaint or information, pleads guilty, such plea may be reported by the commissioner to the court and judgment of conviction rendered and sentence imposed by the court. Then it could be provided that in case the accused so prosecuted pleads not guilty, there shall be a hearing before the commissioner, who shall report to the court, and the court on examination of his findings render judgment of acquittal or conviction as the case may be, and in case of conviction impose sentence. It could be provided further that if conviction is recommended by the commissioner, the

accused may within three days after filing of the commissioner's report except in writing to the report and demand trial by jury. Finally, it could be provided that in such case the district attorney may elect whether to go to trial on the complaint or information or to submit the case to the grand jury and that, in case the grand jury indicts, the case shall then proceed upon the indictment.

The Jones law was enacted to make enforcement more efficacious in two ways: (a) By providing for more severe penalties in the discretion of the court; (b) by making available the collateral consequences of a felony, such, for example, as the rules of law applicable to prevention of a felony and the capture of felons. This was done by making every violation of the national prohibition act a potential felony.

The foregoing suggestions aim at preserving this feature of the existing law. Up to the time when the district attorney elects how to prosecute there is a potential felony. In other words, all the possibilities in the way of arrest and prevention which obtain under the existing law are conserved. But the intention is to make it possible in case of "casual or slight violations" (language of the Jones law) to prosecute as a petty offense, thus relieving congestion in the Federal courts, maintaining the dignity of those tribunals, and making possible speedy disposition. As things are now, the cumbersome process of indictment must be resorted to even in the most petty case. The result is that large numbers of these cases pile up and have to be disposed of offhand by "bargain day," and similar unseemly processes. In any case which the district attorney elects to prosecute by indictment the

judge will still have the discretion provided for in the existing law. If it is objected that a wide discretion is put in the district attorney by the proposed legislation, the answer is that he has that discretion already in effect, simply exercising it, not in the beginning by the mode in which he prosecutes but later by including any particular prosecution in the wholesale disposition on some bargain day.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 907.—October Term, 1936.

Jesse C. Duke, vs. The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[May 24, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The court below, being divided and in doubt, and desiring the instruction and advice of this court, has certified the following questions of law:

"1. May a misdemeanor, for which no infamous punishment is prescribed, be prosecuted by information, where the punishment therefor may exceed $500 fine or six months' imprisonment, without hard labor, or both?

"2. May an offense under Sec. 137 of the Criminal Code be prosecuted by information?"

The certificate contains the following statement of facts:

"This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides:

"'Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both.'

"The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months imprisonment or fine of $1,000, or both, may be prosecuted by information, in view of Sec. 335 of the Criminal Code. . . .

"Notwithstanding the decision in *Thorm* v. *United States* (C. C. A. 3d) 59 Fed. (2d) 419, cert. denied 287 U. S. 524, this court is divided and in doubt as to whether a misdemeanor may be prosecuted by information where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court."

Section 335 of the Criminal Code, c. 321, 35 Stat., 1088, 1152, before its amendment, provided: "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

This section was amended by the Act of December 16, 1930, c. 15, 46 Stat. 1029, 18 U. S. C. § 541, by adding the following proviso: "*Provided,* That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Appellant contends that this language limits the authority to prosecute by information strictly to those offenses punishable as the proviso prescribes. Under the original section, there is no doubt that the offense with which appellant is charged was a misdemeanor which could be prosecuted by information. It will be enough to cite as examples supporting this conclusion *Falconi* v. *United States,* 280 Fed. 766, and *Hunter* v. *United States,* 272 Fed. 235, 238, where other cases are collected. We think the proviso relied upon did not change this rule.

The original section divides crimes into felonies and misdemeanors. The evident object of the proviso was to bring about a subdivision of misdemeanors by creating a class of misdemeanors of minor gravity to be known as petty offenses; to be tried, as proposed by other legislation (which failed), by United States

Commissioners. The addition of the words that "such petty offenses may be prosecuted upon information or complaint" did not work a change of the then well-settled rule that any misdemeanor not involving infamous punishment might be prosecuted by information instead of by indictment. The quoted words probably were inserted, as the government contends and the legislative history indicates, merely to supplement and aid the other proposed legislation then pending to which we have referred; but, in any event, they are affirmative words and do not in terms or by reasonable implication negative the broader long-standing rule in respect of misdemeanors of the other class. *Thorm* v. *United States,* 59 F. (2d) 419. The offense with which appellant was charged was not a petty offense within the proviso, but it was a misdemeanor of a kind, as the certificate recites, not subject to infamous punishment—therefore open to prosecution by information.

Both interrogatories must be answered in the affirmative.

Question No. 1, Yes.
Question No. 2, Yes.

A true copy.

Test:

Clerk, Supreme Court, U. S.